

1 **THE LAW OFFICE OF JACK**  
2 **FITZGERALD, PC**  
3 JACK FITZGERALD (257370)  
4 *jack@jackfitzgeraldlaw.com*  
5 TREVOR M. FLYNN (253362)  
6 *trevor@jackfitzgeraldlaw.com*  
7 MELANIE PERSINGER (275423)  
8 *melanie@jackfitzgeraldlaw.com*  
9 Hillcrest Professional Building  
10 3636 Fourth Avenue, Suite 202  
11 San Diego, California 92103  
12 Phone: (619) 692-3840  
13 Fax: (619) 362-9555

14 ***Counsel for Fiber Research International, LLC***

15 **UNITED STATES DISTRICT COURT**  
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 FIBER RESEARCH INTERNATIONAL,  
18 LLC,

19 Plaintiff,

20 v.

21 ADVANCED BOTANICAL  
22 CONSULTING & TESTING, INC.,

23 Defendant.

24 OBESITY RESEARCH INSTITUTE,  
25 LLC,

26 Plaintiff & Counterclaim-Defendant,

27 v.

28 FIBER RESEARCH INTERNATIONAL,  
LLC,

Defendant & Counterclaim-  
Plaintiff.

**MOTION TO COMPEL  
ADVANCED BOTANICAL  
CONSULTING & TESTING, INC.'S  
COMPLIANCE WITH SUBPOENA  
*DUCES TECUM***

**[FED. R. CIV. P. 45]**

Underlying Case No: 15-cv-595-BAS-MDD

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 45, Fiber Research will,  
 3 and hereby does move to compel Advanced Botanical Consulting & Testing, Inc.'s ("ABC")  
 4 compliance with the Subpoena Duces Tecum served on it by Fiber Research in the underlying  
 5 matter of *Obesity Research Institute, LLC v. Fiber Research International, LLC*, No. 15-cv-  
 6 595-BAS-MDD (S.D. Cal.).

7 This motion is based on this motion, the concurrently-filed memorandum in support  
 8 thereof, the concurrently-filed Declaration of Jack Fitzgerald ("Fitzgerald Decl.") and all  
 9 exhibits thereto, the concurrently filed Declaration of Trevor Flynn ("Flynn Declaration")  
 10 and all exhibits thereto, all papers on file and proceedings had to date, and all argument and  
 11 evidence that may be submitted in support of or in opposition to the motion.

12 This motion was originally intended to be a joint motion before Magistrate Judge  
 13 Dembin in the underlying matter, *Obesity Research Institute, LLC v. Fiber Research*  
 14 *International, LLC*, No. 15-cv-595-BAS-MDD. (Fitzgerald Decl. ¶ 21.) Counsel for ABC,  
 15 however, informed Fiber Research that it would not participate in the joint motion because it  
 16 believes that the District Court for the Southern District of California is not the proper forum  
 17 for this motion. (Flynn Decl. ¶ 3.) But Rule 45(d)(2)(B)(i) provides that "the serving party  
 18 may move the court for the district where compliance is required for an order compelling  
 19 production or inspection." Here, the Subpoena *Duces Tecum* required compliance in San  
 20 Diego (Fitzgerald Decl. Ex. 2), which is of course located in the Southern District, making  
 21 this the proper forum for this dispute.

22 Because ABC refused to provide its portion of the joint motion, Fiber Research has  
 23 been forced to file the instant motion as a miscellaneous action. However, because this action  
 24 is related to the underlying matter, and, accordingly, likely to be transferred to Magistrate  
 25 Judge Dembin, Fiber Research has formatted this motion and all supporting documents  
 26 (including the remainder of this documents, and a Memorandum limiting Fiber Research's  
 27 "portion" to 5 pages) to comply with Judge Dembin's Civil Chambers Rules.

1 **REQUEST FOR PRODUCTION NO. 1**

2 All DOCUMENTS constituting or otherwise CONCERNING COMMUNICATIONS  
 3 between YOU and ORI or NUTRALLIANCE concerning LIPOZENE, glucomannan, or  
 4 Konjac root powder.

5 **ABC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 1**

6 ABC objects to this request on the grounds that it is seeks discovery outside the scope  
 7 permitted by Federal Rule of Civil Procedure 26(b)(1). This request seeks documents and  
 8 information that are not relevant to the claims and defenses in this case, not proportional to  
 9 the needs of the case, and places an undue burden and expense on a non-party, particularly to  
 10 the extent this request seeks documents regarding products other than Lipozene as ABC's  
 11 dealings with ORI and Nutralliance regarding any glucomannan, or Konjac root powder  
 12 product have no bearing on a dispute between FRI and ORI, which at its core is about  
 13 allegations of false advertising related to Lipozene. ABC objects to the extent this request  
 14 calls for disclosure of unretained expert's opinion or information. ABC also objects to the  
 15 extent this request seeks confidential and trade secret information belonging to ORI,  
 16 Nutralliance, and ABC. ORI objects to this request to the extent it seeks documents protected  
 17 by attorney-client privilege, work product, consultant work product, and common interest  
 18 protection doctrines.

19 ABC further objects to this request on the ground FRI is using this subpoena to  
 20 circumvent the Court's October 27, 2015 discovery rulings in which Magistrate Judge  
 21 Dembin specifically ruled FRI was not entitled to certain information. Specifically, ABC  
 22 objects to the request as overbroad to the extent it seeks documents regarding glucomannan  
 23 or Konjac root powder products that are not Lipozene in light of the Court's ruling that  
 24 discovery is limited only to ORI's Lipozene product, not all glucomannan products.  
 25 (Transcript of October 27, 2015 Hearing, p. 10:11-13 [limiting product to Lipozene only].)  
 26 ABC objects to this request as it is not limited to a certain time frame despite the Court's  
 27 ruling that only information concerning liability dating back to 2006 and damages

1 information going back three years is discoverable. (Transcript of October 27, 2015 Hearing,  
 2 pp. 9:18-10:13 [relevant period for liability information dating back to 2006], 13:24-16:10  
 3 [relevant period for damages information limited to previous three years].) ABC also objects  
 4 to the request to the extent it seeks contracts, purchase orders, and other financial related  
 5 information in light of the Court’s ruling that such information is not discoverable. (Transcript  
 6 of October 27, 2015 Hearing, pp. 13:24-16:10 [financial information limited to gross sales  
 7 for prior three years], 29:14-30:6 [contracts and purchase orders not discoverable].)  
 8 Responsive materials are being withheld on the basis of the foregoing objections.

9 **REASONS FOR COMPELLING FURTHER RESPONSE:**

10 ABC’s first conclusory objection fails to specify in any manner how the request “seeks  
 11 discovery outside the scope of permitted by . . . Rule . . . 26(b)(1),” and should be overruled.  
 12 The same is true for its objection that the request “calls for disclosure of unretained expert’s  
 13 opinion or information”—ABC simply provides no explanation why that is the case.

14 ABC’s second objection asserts lack of relevance and proportionality with respect to  
 15 communications between ABC and ORI or Nutralliance, long ORI’s exclusive glucomannan  
 16 supplier for Lipozene, on the basis that such documents “have no bearing on a dispute . . .  
 17 related to Lipozene.” (This objection is repeated in ABC’s second paragraph of objections  
 18 purporting to incorporate the Court’s October rulings on the scope of discovery from ORI.)

19 ABC’s principal stated in response to the subpoena that “any email communications  
 20 are with our customer Nutralliance (we do not know the other company you named in the  
 21 document)” (Fitzgerald Decl. Ex. 4), so there should be no such communications between  
 22 ABC and ORI. And because Nutralliance deals in raw materials, it does not refer to the  
 23 material as Lipozene. Instead, the ABC testing reports usually call it “Konjac root powder.”  
 24 (See *id.* Ex. 10.) Indeed, there is some question still open in the case what exactly Lipozene  
 25 is—whether glucomannan, Konjac root powder, or something else. In addition, ABC has not  
 26 demonstrated or even asserted that it has tested for Nutralliance either glucomannan or  
 27 Konjac root powder that was not in some way related to Lipozene. Even if it did, ABC would

1 have to demonstrate a principled way to concretely identify and separate from Lipozene-  
 2 related Konjac testing communications regarding supposedly non-Lipozene-related Konjac  
 3 testing.

4       Although the Court limited discovery requests directed at ORI to Lipozene only,  
 5 excluding other ORI *products* which also contained glucomannan (such as Lipozene's  
 6 predecessors, Propolene, or Fiber Thin), that ruling is also inapposite to this request, which  
 7 does not seek communications regarding other *products* made with glucomannan, but rather  
 8 communications regarding the constituent ingredients of Lipozene—glucomannan or Konjac  
 9 root powder. ORI has itself produced and is relying on testing results from ABC regarding  
 10 these ingredients, despite not labeled as Lipozene. Indeed, ORI produced and may even be  
 11 relying on ABC testing of non-Lipozene products. (See Fitzgerald Ex. 10 at ORI885-88.)

12       In sum, the limitation the Court imposed in October with respect to ORI was to exclude  
 13 production of information relating to products not at issue in this lawsuit. This is not a  
 14 principled limitation when applied to a third-party testing laboratory whose raw materials  
 15 testing for a party's supplier is being used to support the party's claims and defenses.

16       To the extent this request "seeks confidential and trade secret information belonging  
 17 to ORI, Nutralliance, and ABC," the Protective Order will guard this information against  
 18 further disclosure. (See Dkt. No. 67.)

19       ABC's objection that this request "seeks documents protected by attorney-client  
 20 privilege, work product, consultant work product, and common interest protection doctrines,"  
 21 fails to demonstrate how communications between two third parties, ABC and Nutralliance,  
 22 and not involving attorneys, could be entitled to such protections. Nor has ABC produced a  
 23 privilege log in response to the subpoena *duces tecum*.

24       Finally, ABC's remaining attempts to leverage the Court's October 2015 decision  
 25 narrowing the documents ORI was required to produce should also be rejected. ABC's  
 26 objection about the timeframe should be overruled. Brian Salerno, President and CEO of  
 27 Lipozene's konjac supplier, Nutralliance, testified that he has "always," since Nutralliance

1 has been purchasing konjac, hired ABC to conduct viscosity testing on this ingredient.  
 2 (Fitzgerald Decl. Ex. 12, at 96:18-97:25.) Mr. Salerno further testified that Nutralliance  
 3 started supplying the konjac for Lipozene in the Fall of 2004 (*id.* at 376:7-12), and that ABC  
 4 labs sends testing reports to Nutralliance via email and fax, (*id.* at 253:24-255:7).  
 5 Accordingly, there are likely communications between ABC and Nutralliance discussing  
 6 viscosity testing of the konjac ingredient in Lipozene, dating back to 2004. The viscosity of  
 7 the konjac ingredient in Lipozene, and how it has changed over time, are key issues in this  
 8 case, as it goes to whether Lipozene is the same or substantially similar to the product tested  
 9 in the clinical studies on which ORI's marketing claims are based. And although ABC's final  
 10 objection is really more appropriately considered in response to Request Nos. 5-6, its attempt  
 11 to take advantage of the Court's limiting the financial information ORI was required to  
 12 produce makes little sense. Here Fiber Research requests information that might tend to  
 13 demonstrate bias, namely the amount ABC was paid for the testing, and the person making  
 14 the payment. This last bit of information is also relevant because ORI now claims ABC is a  
 15 "hired consultant," and even perhaps a "functional employee" of ORI (despite that ABC does  
 16 not know who ORI is).

17 **BASIS FOR ALL OBJECTIONS AND/OR CLAIMS OF PRIVILEGE:**

18 Counsel for ABC declined to respond to FRI's "reasons for compelling further  
 19 response."

20 **REQUEST FOR PRODUCTION NO. 2**

21 All DOCUMENTS relating to ABC laboratory testing report numbers (i.e., "Lab #'s"):

- 22 • 153654 (report date: 11/10/2015)
- 23 • 152794 (report date: 11/6/2015)
- 24 • 152793 (report date: 11/6/2015)
- 25 • 152792 (report date: 11/6/2015)
- 26 • 153720 (report date: 11/6/2015)

- 1      • 146901 (report date: 8/10/2015)
- 2      • 118344 (report date: 5/15/2014)
- 3      • 086307 (report date: 8/1/2012)
- 4      • 085969 (report date: 7/23/2012)
- 5      • 085970 (report date: 7/23/2012)
- 6      • 085971 (report date 7/23/2012)
- 7      • 085972 (report date: 7/23/2012)

## 8      **ABC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 2**

9      ABC objects to this request on the grounds that it is seeks discovery outside the scope  
10     permitted by Federal Rule of Civil Procedure 26(b)(1). This request seeks documents and  
11     information that are not relevant to the claims and defenses in this case, not proportional to  
12     the needs of the case, and places an undue burden and expense on a non-party, particularly to  
13     the extent this request seeks all documents related to laboratory resting report numbers  
14     without any limitation whatsoever. ABC has communicated with counsel for FRI and  
15     demanded payment for the undue costs associated with responding to the Request, but FRI  
16     has denied any such request. ABC objects to the extent this request calls for disclosure of  
17     unretained expert's opinion or information. ABC also objects to the extent this request seeks  
18     confidential and trade secret information belonging to ORI, Nutralliance, and ABC. ABC  
19     objects to this request to the extent it seeks documents protected by attorney-client privilege,  
20     work product, consultant work product, and common interest protection doctrines.

21      ABC further objects to this request on the ground FRI is using this subpoena to  
22     circumvent the Court's October 27, 2015 discovery rulings in which Magistrate Judge  
23     Dembin specifically ruled FRI was not entitled to certain information. Specifically, ABC  
24     objects to the request as overbroad to the extent it seeks documents regarding glucomannan  
25     or Konjac root powder products that are not Lipozene in light of the Court's ruling that  
26     discovery is limited only to ORI's Lipozene product, not all glucomannan products.

1 (Transcript of October 27, 2015 Hearing, p. 10:11-13 [limiting product to Lipozene only].)  
 2 ABC also objects to the request to the extent it seeks contracts, purchase orders, and other  
 3 financial related information in light of the Court's ruling that such information is not  
 4 discoverable. (Transcript of October 27, 2015 Hearing, pp. 13:24-16:10 [financial  
 5 information limited to gross sales for prior three years], 29:14-30:6 [contracts and purchase  
 6 orders not discoverable].) Responsive materials are being withheld on the basis of the  
 7 foregoing objections.

8 **REASONS FOR COMPELLING FURTHER RESPONSE:**

9 ABC's first conclusory objection fails to specify in any manner how the request "seeks  
 10 discovery outside the scope of permitted by . . . Rule . . . 26(b)(1)," and should be overruled.  
 11 The same is true for its objection that the request "calls for disclosure of unretained expert's  
 12 opinion or information"—ABC simply provides no explanation why that is the case.

13 ABC's second objection asserts lack of relevance and proportionality, and undue  
 14 burden, "particularly to the extent this request seeks all documents related to laboratory  
 15 resting report numbers without any limitation whatsoever." For any given laboratory testing,  
 16 however, there are only so many "related" documents. For each ABC test report ORI is  
 17 relying on, that should likely include a limited universe of documents: test request forms, raw  
 18 data, calculation sheets, the chemist's notes, and a chain of custody. (*See* Fitzgerald Decl. Ex.  
 19 9 at 40:3-47:2.) Because ORI is relying on these very lab reports, Fiber Research is entitled  
 20 to all of that related information, which could include evidence that certain results are  
 21 mistaken, or discussions that clarify or give context to different elements of the testing results.

22 Nor can ABC credibly assert that this request places an undue burden or expense on it  
 23 when Wendi Wang has admitted that "if you give [ABC] a specific log number, lab number,"  
 24 as FRI did, ABC "can go to the computer and print out a Word file, that's the easiest. It is in  
 25 a computer, you just print it out." (Fitzgerald Decl. Ex. 9 at 48:17-21.)

1 To the extent this request “seeks confidential and trade secret information belonging  
 2 to ORI, Nutralliance, and ABC,” the Protective Order will guard this information against  
 3 further disclosure. (See Dkt. No. 67.)

4 ABC’s objection that this request “seeks documents protected by attorney-client  
 5 privilege, work product, consultant work product, and common interest protection doctrines,”  
 6 fails to demonstrate how communications between two third parties, ABC and Nutralliance,  
 7 and not involving attorneys, could be entitled to such protections. Nor has ABC produced a  
 8 privilege log in response to the subpoena *duces tecum*.

9 ABC’s reliance on the Court’s October 27, 2015 discovery rulings is misplaced.  
 10 Although the Court limited discovery requests directed at ORI to Lipozene only, excluding  
 11 other ORI products which also contained glucomannan (such as Lipozene’s predecessor,  
 12 Propolene, or ORI’s other product glucomannan product, Fiber Thin), that ruling is inapposite  
 13 to the requests here regarding testing reports that ORI itself has produced in this Lipozene  
 14 litigation, conceding that they are either testing of Lipozene or its raw ingredients, or  
 15 sufficiently related to be relevant.

16 ABC’s remaining attempts to leverage the Court’s October 2015 decision narrowing  
 17 the documents ORI was required to produce should also be rejected. ABC’s complaint about  
 18 the timeframe is academic, since the documents requested relate to testing reports dated, at  
 19 the earliest, in 2012. However, if for some reason documents relating to 2012 testing reports  
 20 were created earlier than the testing report itself, the court in the underlying matter has already  
 21 found that information relevant by opening up discovery from ORI beginning in 2006  
 22 (coinciding with ORI’s approximate commencement of selling Lipozene in November 2005).  
 23 Further, Brian Salerno, the President and CEO of Nutralliance, ORI’s exclusive glucomannan  
 24 supplier for Lipozene, testified that it has hired ABC to conduct testing on the konjac  
 25 ingredient in Lipozene (*id.* at 367:1-3), and that ABC labs sends testing reports to Nutralliance  
 26 via email and fax, (*id.* at 245:3-246:11). And although ABC’s final objection is really more  
 27 appropriately considered in response to Request Nos. 5-6, its attempt to take advantage of the

1 Court's limiting the financial information ORI was required to produce makes little sense.  
 2 Here Fiber Research requests information that might tend to demonstrate bias, namely the  
 3 amount ABC was paid for the testing, and the person making the payment. This last bit of  
 4 information is also relevant because ORI now claims ABC is a "hired consultant," and even  
 5 perhaps a "functional employee" of ORI (despite that ABC does not know who ORI is).

6 Lastly, notwithstanding these objections, ABC already stated it would produce  
 7 "chemist lab notebooks" if FRI agreed to pay an unidentified amount for the production. (*See*  
 8 Fitzgerald Decl. Ex. 4.) As argued in the concurrently-filed memorandum, the Court should  
 9 order ABC to produce these documents and then, if its believes its actual costs are significant  
 10 in relation to its ability to bear such costs, permit ABC to seek cost shifting. *See Cornell v.*  
 11 *Columbus McKinnon Corp.*, 2015 WL 4747260, at \*1 (N.D. Cal. Aug. 11, 2015) (The Court  
 12 ordered the nonparty to comply with the parties' pending discovery requests, and deferred  
 13 ruling on the issue of cost-shifting, noting: "Once all discovery has been produced, [nonparty]  
 14 may file a motion for cost shifting. The Court may then rely on the developed record to  
 15 determine whether significant expenses have indeed been reasonably incurred.").

16 **BASIS FOR ALL OBJECTIONS AND/OR CLAIMS OF PRIVILEGE:**

17 Counsel for ABC declined to respond to FRI's "reasons for compelling further  
 18 response."

19 **REQUEST FOR PRODUCTION NO. 3**

20 All DOCUMENTS concerning any methodology used in the testing reflected in the  
 21 lab reports identified in Request No. 2.

22 **ABC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 3**

23 ABC objects to this request on to the extent this request seeks confidential and trade  
 24 secret information belonging to ORI, Nutralliance, and ABC. ABC objects to the extent this  
 25 request calls for disclosure of unretained expert's opinion or information. ABC objects to this  
 26 request to the extent it seeks documents protected by attorney-client privilege, work product,  
 27  
 28

1 consultant work product, and common interest protection doctrines. Responsive materials are  
 2 being withheld on the basis of the foregoing objections.

3 **REASONS FOR COMPELLING FURTHER RESPONSE:**

4 To the extent “this request seeks confidential and trade secret information belonging  
 5 to ORI, Nutralliance, and ABC,” the Protective Order will guard this information against  
 6 further disclosure. (See Dkt. No. 67.)

7 ABC’s objection that the request calls for nonretained expert opinion or information is  
 8 wrong, since the request concerns the specific methodologies used for the specific testing  
 9 reflected in the 12 reports identified in Request No. 2, rather than information about testing  
 10 methodologies generally. Indeed, ABC does not object on the basis of relevance.

11 This request calls for documents related to, or which define and/or explain, the  
 12 methodologies utilized by ABC in conducting tests on Lipozene and its constituent  
 13 ingredients. Understanding the methodology of the testing may be critical to FRI’s ability to  
 14 rebut the evidence on which ORI intends to rely to support its claims and defenses. Indeed,  
 15 the very test for excluding expert testimony under *Daubert* is “the soundness of [the]  
 16 methodology.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (quoting *Daubert v.*  
 17 *Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995)). Further, testimony from  
 18 Brian Salerno, President and CEO of Nutralliance, ORI’s exclusive glucomannan supplier for  
 19 Lipozene and the company that hired ABC to conduct testing on that ingredient, indicates  
 20 that FRI likely cannot obtain this information elsewhere. Mr. Salerno testified that he does  
 21 not know which methodologies were used for various tests, and that the proper entity to ask  
 22 is ABC. (Fitzgerald Decl. Ex. 12, at 253:24-255:7, 259:12-14, 260:15-18, 262:8-23, 299:7-  
 23 17.)

24 ABC’s objection that this request “seeks documents protected by attorney-client  
 25 privilege, work product, consultant work product, and common interest protection doctrines,”  
 26 fails to demonstrate the applicability of any such privilege to the methodologies ABC used  
 27 to engage in the testing on which ORI is relying, but even if it were for some reason privilege

1 or work product, that is waived by ORI's reliance on the testing—Fiber Research has a right  
 2 to information that could help challenge the validity of the testing, and methodology is one  
 3 clear such avenue.

4 Lastly, notwithstanding these objections, ABC already stated would produce these  
 5 methodologies if only FRI agreed to pay an unidentified sum to ABC for the production. (See  
 6 Fitzgerald Decl. Ex. 4.) As argued in the concurrently filed memorandum, the Court should  
 7 order ABC to produce these documents and then, if it believes its costs are significant in  
 8 relation to its ability bear such costs, permit ABC to seek cost shifting. *See Cornell v.*  
 9 *Columbus McKinnon Corp.*, 2015 WL 4747260, at \*1 (N.D. Cal. Aug. 11, 2015) (The Court  
 10 ordered the nonparty to comply with the parties' pending discovery requests, and deferred  
 11 ruling on the issue of cost-shifting, noting: "Once all discovery has been produced, [nonparty]  
 12 may file a motion for cost shifting. The Court may then rely on the developed record to  
 13 determine whether significant expenses have indeed been reasonably incurred.").

14 **BASIS FOR ALL OBJECTIONS AND/OR CLAIMS OF PRIVILEGE:**

15 Counsel for ABC declined to respond to FRI's "reasons for compelling further  
 16 response."

17 **REQUEST FOR PRODUCTION NO. 4**

18 To the extent not produced in response to Request No. 3, all DOCUMENTS  
 19 concerning any methodology for performing viscosity testing.

20 **ABC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 4**

21 ABC objects to this request on to the extent this request seeks confidential and trade  
 22 secret information belonging to ORI, Nutralliance, and ABC. ABC objects to the extent this  
 23 request calls for disclosure of unretained expert's opinion or information. ABC objects to this  
 24 request to the extent it seeks documents protected by attorney-client privilege, work product,  
 25 consultant work product, and common interest protection doctrines. ABC also objects on the  
 26 grounds that this request is overbroad and burdensome as it seeks any methodology for  
 27 performing viscosity testing, regardless of whether such methods were used in the laboratory

1 testing reports identified in Request No. 2. Responsive materials are being withheld on the  
 2 basis of the foregoing objections.

3 **REASONS FOR COMPELLING FURTHER RESPONSE:**

4 To the extent “this request seeks confidential and trade secret information belonging  
 5 to ORI, Nutralliance, and ABC,” the Protective Order will guard this information against  
 6 further disclosure. (See Dkt. No. 67.)

7 Further, ABC’s objection that this request “seeks documents protected by attorney-  
 8 client privilege, work product, consultant work product, and common interest protection  
 9 doctrines,” fails to describe how ABC’s internal documents relating to testing already  
 10 produced would be entitled to such protections, nor produced a privilege log in response to  
 11 the subpoena *duces tecum*.

12 ABC’s objection that the request calls for unretained expert opinion or information is  
 13 conclusory. ABC similarly objects that the request is overbroad because it is not limited to  
 14 the methodology “used in the laboratory testing reports identified in Request No. 2.” As  
 15 demonstrated by ORI’s reliance on the viscosity tests conducted by ABC, viscosity is of  
 16 particular importance in this action. Because the soundness of the testing methodology is  
 17 critical to determining the admissibility of expert testimony relying on the ABC testing, *see*  
 18 *Daubert*, 43 F.3d at 1318, information about viscosity testing methodologies in the  
 19 possession, custody, or control of ORI’s testing laboratory are highly relevant. The ABC  
 20 testing reports indicate ABC applied a “Customer method.” (See Fitzgerald Decl. Ex. 10.)  
 21 The comparison of the method provided by Nutralliance/ORI to more standard methods may  
 22 help Fiber Research show deficiencies in the methods used. Moreover, there are only so many  
 23 methodologies, and ABC has presented no basis for believing retrieval of such documents  
 24 would be unduly burdensome.

25 Lastly, notwithstanding these objections, ABC already stated it would produce these  
 26 methodologies if FRI agreed to pay an unidentified sum for the production. (See Fitzgerald  
 27 Decl. Ex. 4.) As argued in the concurrently-filed memorandum, the Court should order ABC

28

1 to produce these documents and then, if it believes its costs are significant in relation to its  
 2 ability bear such costs, permit ABC to seek cost shifting. *See Cornell v. Columbus McKinnon*  
 3 *Corp.*, 2015 WL 4747260, at \*1 (N.D. Cal. Aug. 11, 2015) (The Court ordered the nonparty  
 4 to comply with the parties' pending discovery requests, and deferred ruling on the issue of  
 5 cost-shifting, noting: "Once all discovery has been produced, [nonparty] may file a motion  
 6 for cost shifting. The Court may then rely on the developed record to determine whether  
 7 significant expenses have indeed been reasonably incurred.").

8 **BASIS FOR ALL OBJECTIONS AND/OR CLAIMS OF PRIVILEGE:**

9 Counsel for ABC declined to respond to FRI's "reasons for compelling further  
 10 response."

11 **REQUEST FOR PRODUCTION NO. 5**

12 DOCUMENTS, such as invoices and copies of checks, sufficient to show the amount  
 13 YOU were compensated for performing the testing reflected in the lab reports identified in  
 14 Request No. 2.

15 **ABC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 5**

16 ABC objects to this request on the grounds that it is seeks discovery outside the scope  
 17 permitted by Federal Rule of Civil Procedure 26(b)(1). This request seeks documents and  
 18 information that are not relevant to the claims and defenses in this case, not proportional to  
 19 the needs of the case, and places an undue burden and expense on a non-party. Documents  
 20 reflecting the amounts ABC were compensated for its testing is irrelevant to the claims at  
 21 issue in this case. Furthermore, ABC has not been designated as an expert witness in this  
 22 case. ABC also objects to the extent this request seeks confidential and trade secret  
 23 information belonging to ORI, Nutralliance, and ABC. ABC objects to the extent this request  
 24 calls for disclosure of unretained expert's opinion or information. ABC objects to this request  
 25 to the extent it seeks documents protected by attorney-client privilege, work product,  
 26 consultant work product, and common interest protection doctrines. Responsive materials are  
 27 being withheld on the basis of the foregoing objections.

1 **REASONS FOR COMPELLING FURTHER RESPONSE:**

2 ABC's first conclusory objection fails to specify in any manner how the request "seeks  
 3 discovery outside the scope of permitted by . . . Rule . . . 26(b)(1)," and should be overruled,  
 4 along with ABC's relevance objection. To the contrary, this request seeks information  
 5 regarding how much ORI (or its supplier Nutralliance) paid ABC to perform testing of  
 6 Lipozene or its constituent ingredients. These documents are relevant to establish any bias or  
 7 favoritism that ABC may have shown ORI. Although ABC is not a designated expert, ORI  
 8 has described it as a "retained consultant" (*see* Fitzgerald Decl. Ex. 11, ORI's Privilege Log,  
 9 Rows 1-13), and compensation paid to consultants "is relevant to show the extent of the  
 10 relationship between them and the [party], . . . and the bias of these consultants." *See U.S.*  
 11 *Nutraceuticals LLC v. Cyanotech Corp.*, 2014 WL 1918040, at \*4 (M.D. Fla. May 13, 2014)  
 12 (overruling objections and ordering defendant to produce documentation of the amount of  
 13 compensation paid to its consultant).

14 To the extent "this request seeks confidential and trade secret information belonging  
 15 to ORI, Nutralliance, and ABC," the Protective Order will guard this information against  
 16 further disclosure. (*See* Dkt. No. 67.)

17 ABC fails to explain its objection that the request "calls for disclosure of unretained  
 18 expert's opinion or information," and on its face the request does not, since it concerns  
 19 payment ABC received for the testing on which ORI relies.

20 Further, ABC's objection that this request "seeks documents protected by attorney-  
 21 client privilege, work product, consultant work product, and common interest protection  
 22 doctrines," fails to describe how ABC's internal documents relating to testing already  
 23 produced would be entitled to such protections, nor produced a privilege log in response to  
 24 the subpoena *duces tecum*.

25 Lastly, notwithstanding these objections, ABC already stated it would produce these  
 26 invoices if FRI agreed to pay an unidentified sum for the production. (*See* Fitzgerald Decl.  
 27 Ex. 4.) As argued in the concurrently-filed memorandum, the Court should order ABC to

1 produce these documents and then, if it believes its costs are significant in relation to its  
 2 ability bear such costs, permit ABC to seek cost shifting. *See Cornell v. Columbus McKinnon*  
 3 *Corp.*, 2015 WL 4747260, at \*1 (N.D. Cal. Aug. 11, 2015) (The Court ordered the nonparty  
 4 to comply with the parties' pending discovery requests, and deferred ruling on the issue of  
 5 cost-shifting, noting: "Once all discovery has been produced, [nonparty] may file a motion  
 6 for cost shifting. The Court may then rely on the developed record to determine whether  
 7 significant expenses have indeed been reasonably incurred.").

8 **BASIS FOR ALL OBJECTIONS AND/OR CLAIMS OF PRIVILEGE:**

9 Counsel for ABC declined to respond to FRI's "reasons for compelling further  
 10 response."

11 **REQUEST FOR PRODUCTION NO. 6**

12 DOCUMENTS, such as invoices and copies of checks, sufficient to show the  
 13 PERSONS from whom you received compensation for performing the testing reflected in  
 14 the lab reports identified in Request No. 2.

15 **ABC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 6**

16 ABC objects to this request on the grounds that it is seeks discovery outside the scope  
 17 permitted by Federal Rule of Civil Procedure 26(b)(1). This request seeks documents and  
 18 information that are not relevant to the claims and defenses in this case, not proportional to  
 19 the needs of the case, and places an undue burden and expense on a non-party. Documents  
 20 reflecting who paid ABC for its testing is irrelevant to the claims at issue in this case.  
 21 Furthermore, ABC has not been designated as an expert witness in this case. ABC objects to  
 22 the extent this request calls for disclosure of unretained expert's opinion or information. ABC  
 23 also objects to the extent this request seeks confidential and trade secret information  
 24 belonging to ORI, Nutralliance, and ABC. ABC objects to this request to the extent it seeks  
 25 documents protected by attorney-client privilege, work product, consultant work product, and  
 26 common interest protection doctrines. Responsive materials are being withheld on the basis  
 27 of the foregoing objections.

28

1 **REASONS FOR COMPELLING FURTHER RESPONSE:**

2 ABC's first conclusory objection fails to specify in any manner how the request "seeks  
 3 discovery outside the scope of permitted by . . . Rule . . . 26(b)(1)," and should be overruled,  
 4 along with ABC's relevance objection. Similar to Request For Production No. 5, these  
 5 documents are relevant to any potential bias of ABC, as well as the veracity of ORI's assertion  
 6 that ABC (which does not even know ORI) is a "retained consultant." These documents are  
 7 also relevant to any bias of ORI's non-retained expert, Brian Salerno, President of  
 8 Nutralliance, as the testing results were addressed to Nutralliance, not ORI (see Fitzgerald  
 9 Decl. Ex. 10).

10 To the extent "this request seeks confidential and trade secret information belonging  
 11 to ORI, Nutralliance, and ABC," the Protective Order will guard this information against  
 12 further disclosure. (See Dkt. No. 67.)

13 Further, ABC's objection that this request "seeks documents protected by attorney-  
 14 client privilege, work product, consultant work product, and common interest protection  
 15 doctrines," fails to describe how ABC's internal documents relating to testing already  
 16 produced would be entitled to such protections, nor produced a privilege log in response to  
 17 the subpoena *duces tecum*.

18 Lastly, notwithstanding these objections, ABC stated it would produce these  
 19 documents if FRI agreed to pay an unidentified sum for the production. (See Fitzgerald Decl.  
 20 Ex. 4.) As argued in the concurrently-filed memorandum, the Court should order ABC to  
 21 produce these documents and then, if it believes its costs are significant in relation to its  
 22 ability bear such costs, permit ABC to seek cost shifting. *See Cornell v. Columbus McKinnon*  
 23 *Corp.*, 2015 WL 4747260, at \*1 (N.D. Cal. Aug. 11, 2015) (The Court ordered the nonparty  
 24 to comply with the parties' pending discovery requests, and deferred ruling on the issue of  
 25 cost-shifting, noting: "Once all discovery has been produced, [nonparty] may file a motion  
 26 for cost shifting. The Court may then rely on the developed record to determine whether  
 27 significant expenses have indeed been reasonably incurred.").

**BASIS FOR ALL OBJECTIONS AND/OR CLAIMS OF PRIVILEGE:**

Counsel for ABC declined to respond to FRI's "reasons for compelling further response."

**REQUEST FOR PRODUCTION NO. 7**

Copies of YOUR document retention policies from August 1, 2012 to the present, including any changes thereto.

**ABC'S RESPONSE TO REQUEST FOR PRODUCTION NO. 7**

ABC also objects to the extent this request seeks confidential, proprietary, and trade secret business information belonging to ABC. Responsive materials are being withheld on the basis of the foregoing objections.

## **REASONS FOR COMPELLING FURTHER RESPONSE:**

ABC's document retention policy will outline how long ABC retains the types of documents requested in the Subpoena *duces tecum* and thus enable FRI to assess the completeness of ABC's production. Although ABC provides no basis for believing its document retention policies are truly confidential, to the extent "this request seeks confidential, proprietary, and trade secret business information belonging to ABC," the Protective Order will guard this information against further disclosure. (See Dkt. No. 67.)

**BASIS FOR ALL OBJECTIONS AND/OR CLAIMS OF PRIVILEGE:**

Counsel for ABC declined to respond to FRI's "reasons for compelling further response."

Dated: February 19, 2016 /s/ Jack Fitzgerald

**THE LAW OFFICE OF JACK FITZGERALD, PC**  
JACK FITZGERALD  
*jack@jackfitzgeraldlaw.com*  
TREVOR M. FLYNN  
*trevor@jackfitzgeraldlaw.com*  
MELANIE PERSINGER

*melanie@jackfitzgeraldlaw.com*  
Hillcrest Professional Building  
3636 Fourth Avenue, Suite 202  
San Diego, California 92103  
Phone: (619) 692-3840  
Fax: (619) 362-9555

***Counsel for Fiber Research International, LLC***

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

Fiber Research International, LLC

(b) County of Residence of First Listed Plaintiff Carson City, Nevada  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Jack Fitzgerald, The Law Office of Jack Fitzgerald, PC  
3636 Fourth Ave., Suite 202, San Diego, CA 92103  
Phone: 619-692-3840

**DEFENDANTS**

Advanced Botanical Consulting &amp; Testing, Inc.

County of Residence of First Listed Defendant Orange County, CA  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF  
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)  
Richard P. Sybert, Gordon & Rees  
101 W. Broadway, Suite 2000, San Diego, CA 92101  
Phone: (619) 696-6700

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State	<input type="checkbox"/> PTF 1	<input type="checkbox"/> DEF 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> PTF 4	<input type="checkbox"/> DEF 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<b>PERSONAL INJURY</b>	<b>PERSONAL INJURY</b>	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 375 False Claims Act
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 330 Federal Employers' Liability	<b>PROPERTY RIGHTS</b>	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<b>LABOR</b>	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL PROPERTY</b>	<input type="checkbox"/> 720 Labor/Management Relations	<input type="checkbox"/> 850 Securities/Commodities Exchange
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 740 Railway Labor Act	<input checked="" type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 751 Family and Medical Leave Act	<input type="checkbox"/> 891 Agricultural Acts
<b>REAL PROPERTY</b>	<b>CIVIL RIGHTS</b>	<b>PRISONER PETITIONS</b>	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 440 Other Civil Rights	<b>Habeas Corpus:</b>	<input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 463 Alien Detainee	<b>FEDERAL TAX SUITS</b>	<input type="checkbox"/> 896 Arbitration
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 899 Administrative Procedure
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	Act/Review or Appeal of Agency Decision
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 535 Death Penalty		<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<b>Other:</b>		
	<input type="checkbox"/> 448 Education	<input type="checkbox"/> 540 Mandamus & Other	<b>IMMIGRATION</b>	
		<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 462 Naturalization Application	
		<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 465 Other Immigration Actions	
		<input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		

**V. ORIGIN** (Place an "X" in One Box Only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from Another District (specify)	<input type="checkbox"/> 6 Multidistrict Litigation
---	---	--	---	--	---

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
Fed. R. Civ. P. 45(d)(2)(b)(1), 45(g)

**VI. CAUSE OF ACTION**

Brief description of cause:  
Motion to Compel Compliance with Subpoena Duces Tecum

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE Hon. Cynthia Bashant (MDD)

DOCKET NUMBER 15-cv-0595-BAS-MDD

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_

APPLYING IFP \_\_\_\_\_

JUDGE \_\_\_\_\_

MAG. JUDGE \_\_\_\_\_